Petition

81-272

No. _____

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IN THE

Supreme Court of the United States

October Term, 1981

MAX LaVALLEY, THOMAS SOMMERVILLE AND
CITY OF ROYAL OAK,
Petitioners,
-vs-
NORTHWOOD APARTMENTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

DOES 28 USC §1341 APPLY TO BAR THE MAINTENANCE OF A SUIT IN FEDERAL DISTRICT COURT WHICH CHALLENGES THE LEGALITY OF A STATE PROPERTY TAX ASSESSMENT UNDER 42 USC §1983, § 1985 SEEKING ACTUAL AND PUNITIVE DAMAGES?

II

DO THE POLICIES UNDERLYING 28 USC § 1341 PROVIDE AN INDEPENDENT BASIS WHEREBY A FEDERAL DISTRICT COURT MAY EXERCISE ITS DISCRETION AND DECLINE TO ASSERT ITS JURISDICTION OVER A SUIT SEEKING ACTUAL AND PUNITIVE DAMAGES, WHICH SUIT WOULD CLEARLY BE BARRED BY THE TEXT OF 28 USC §1341 HAD AN INJUNCTION BEEN REQUESTED?

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

MAX LaVALLEY, THOMAS SOMMERVILLE AND
CITY OF ROYAL OAK,
Petitioners,
-vs-
NORTHWOOD APARTMENTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Max LaValley, Thomas Sommerville and The City of Royal Oak, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 14, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Michigan was rendered orally from the bench on August 31, 1979 by the Honorable James P. Churchill and a transcript of that opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 14, 1981, and this Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ *1341. Taxes by States.*

The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the Courts of such state.

United States Code, Title 42:

§ *1983. Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ *1985(2). Obstruction of justice, intimidating party, witness, or juror.*

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked pursuant to 28 USC § 1343 and principles of pendant jurisdiction.

Petitioners LaValley and Sommerville are the tax assessor and deputy tax assessor of the Petitioner City of Royal Oak. As such, it is their responsibility to assess the valuation of all real property within the City of Royal Oak for property tax purposes and to determine the need for periodic reassessment. Respondent, Northwood Apartments, is a Michigan Co-Partnership which owns an apartment development located in the City of Royal Oak, Michigan.

Respondent appealed the assessment of its property for the years 1975, 1976, 1977 and 1978 to the Michigan Tax Tribunal, a body created by MCLA 205.701, alleging that its property was over-assessed in those years due to the method of valuation used by the assessor. The Tax Tribunal found that the method of valuation used by the assessor was, in part, incorrect and ordered a refund of that portion of Respondent's property taxes which were paid as a result of over-assessment. The City appealed the decision of the Tax Tribunal and its decision was affirmed in *Northwood Apartments* v *City of Royal Oak*, 98 Mich App 721 (1980). The Tax Tribunal had refused jurisdiction of the 1977 claim on the ground that the jurisdictional prerequisite had not been met. This ruling was not appealed by Northwood.

On July 27, 1978, subsequent to the hearing before the Tax Tribunal but prior to its judgment, Respondent started this suit in the United States District Court for the Eastern District of Michigan. Respondent alleged, for

the first time, that Petitioners[1] had reassessed its property in 1978, a year in which there was no city-wide reassessment, in retaliation for Respondent's appeal of prior years' assessments to the Michigan Tax Tribunal. Respondent alleged that such action constituted a violation of 42 USC § 1983 and § 1985 as well as constituting abuse of process and malicious use of process under state law. The allegations contained in this Complaint had not been raised before the Tax Tribunal.

Respondent sought to represent a class of all owners of real property within the City of Royal Oak. The relief sought by Respondent in this action was (1) a Declaratory Judgment; (2) A permanent injunction restraining Petitioners from reassessing property owners who had appealed to the Michigan Tax Tribunal except in those years in which a city-wide reassessment took place; (3) Actual damages; and (4) Punitive damages.

On July 20, 1979, Petitioners filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This Motion was based on alternate grounds: (1) The Federal Tax Injunction Act, 28 USC § 1341, deprived the District Court of Jurisdiction to hear the matter; and (2) principles of comity and federalism underlying the Tax Injunction Act provided an independent, judicially created basis for abstention.

In its responsive brief, Respondents agreed to "delete" that portion of the Complaint seeking injunctive and

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[1] The Complaint in this matter originally named three members of the Board of Review for the City of Royal Oak as defendants in addition to Petitioners. These members of the Board of Review were subsequently voluntarily dismissed.

declaratory relief, as well as the class allegations. Except for the deletion of these prayers, the Complaint remained the same.

On August 31, 1979, oral argument was heard and the District Court, ruling from the bench, granted Petitioner's Motion and found that the suit would have the effect of interfering with the State's administration of its taxes. An Order to that effect and a Judgment of Dismissal were entered on September 12, 1979.

On September 20, 1979, Respondent filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, with Judge Phillips dissenting, reversed the District Court and held that neither the Tax Injunction Act nor any theory of abstention barred the Court from entertaining this suit.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 28 USC § 1341, IT'S UNDERLYING POLICIES, AND THEIR APPLICABILITY TO CASES INVOLVING MATTERS OF STATE TAXATION WHICH SEEK DAMAGES.

Section 1341 provides that the Federal District Courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."[2] This Act is generally referred to as the "Tax Injunction Act."

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[2] Respondent has never contended that Michigan failed to provide a "plain, speedy and efficient remedy" for the protection of the rights asserted in its complaint. Indeed, in *Kistner* v *Milliken*, 432 F Supp

(continued on following page)

Prior to the passage of the first Tax Injunction Act in 1937[3] it had been the practice of the federal courts to refrain from exercising their equity jurisdiction and interfering with matters of state taxation where a plain, adequate and complete remedy had been provided by the states. *Matthews* v *Rodgers*, 284 US 521 (1932); *First National Bank* v *Board of County Commissioners*, 264 US 450 (1924). The passage of the Tax Injunction Act was considered to be Congressional recognition and sanction of this independent, judicially created policy of abstention in such cases. *Great Lakes* v *Huffman*, 319 US 293 (1943); *Moe* v *Confederated Salish and Kootinai Tribes*, 425 US 463 (1976).

Even after the passage of the Tax Injunction Act, Courts have continued to utilize, as well as broaden, this theory of abstention in those cases in which the literal language of the Tax Injunction Act may not apply. e.g. *Ludwin* v *City of Cambridge*, 592 F2d 606 (1st Cir 1979); *Detroit Edison Company* v *East China Township School District No. .* 378 F2d 225 (6th Cir 1967); *Kistner* v

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(continued from preceding page)

1001 (ED Mich 1977) the court found that Michigan does provide such a remedy. See also *Wyandotte Chemicals Corporation* v *Wyandotte*, 321 F2d 927 (6th Cir 1963), *Detroit Edison Company* v *East China Township School District No. 3*, 378 F2d 225 (6th Cir 1967) and *Aluminum Company of America* v *Department of Treasury of State of Michigan*, 522 F2d 1120 (6th Cir 1975).

[3] Act of August 21, 1937, 50 STAT 738, 28 USC § 41(1).

Milliken, 432 F Supp 1001 (E.D. Mich 1977); *Independent Baptist Church of Red Bank* v *Tennessee*, 468 F Supp 71 (E.D. Tenn 1978); *Edwards* v *Transcontinental Gas Pipe Line Corp*, 464 F Supp 654 (MD La 1979). These cases have applied the policy of non-interference with the state's collection of its revenue except where the asserted Federal Rights might otherwise be lost.

In the case at bar, the Sixth Circuit held that the Tax Injunction Act neither expressly nor impliedly precluded the present damage action. It also held that neither the policies underlying the Tax Injunction Act, nor any theory of abstention, provided a basis whereby the District Court could exercise its discretion and refuse to entertain such a suit. In its opinion the Sixth Circuit expressly agreed with the decision of the Seventh Circuit in *Fulton Market Cold Storage Co* v *Cullerton*, 582 F2d 1071 (7th Cir 1978); *cert denied*, 439 US 1121.

This ruling of the Sixth Circuit is in conflict with the decision of the Fifth Circuit Court of Appeals in *A Bonding Company* v *Sunnuck*, 629 F2d 1127 (5th Cir 1980) and with the affirmance of the District Court's ruling by the Eighth Circuit in *Fair Assessment In Real Estate Association, Inc* v *McNary*, 478 F Supp 1231 (E.D. Mo 1979), affirmed 622 F2d 415 (8th Cir 1980), *cert granted*, 4/6/81 49 USLW 3743.[4]

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[4] In the *McNary* case the question presented to this court for review is "did district court err in dismissing action on grounds that Tax Injunction Act bars suit at law for damages under 14th Amendment and 42 USC 1983 arising from respondent's past discriminatory practices in assessing petitioners' property and in taxing petitioners?" (49 USLW 3362, Nov 11, 1980) On appeal from the district court ruling the 8th Circuit, sitting *en banc*, was equally divided and necessarily affirmed the lower court's ruling.

The conflict between the circuits appears to involve three inter-related questions: (1) Is § 1341 to be read broadly or narrowly? (2) Does the legislative history of § 1341 and/or it's underlying policy considerations support a conclusion that no suits, legal or equitable, which challenge matters of state taxation should be maintained in the Federal Courts? (3) Do suits seeking damages, which would otherwise fall within the literal language of § 1341, have the detrimental effect on the state's administration of its taxes which section § 1341 seeks to avoid?

In *A Bonding Co* v *Sunnuck*, 629 F2d 1127 at 1133 (5th Cir 1980) the Fifth Circuit reiterated its position that "§ 1341 is not a narrow statute aimed only at injunctive intereference with tax collection, but is rather a broad restriction on Federal jurisdiction in suits that impede state tax administration," quoting from *United Gas Pipe Line Co* v *Whitman*, 592 F2d 323, 326 (5th Cir 1979). Indeed, the Act itself had previously been found to bar claims for declaratory relief[5] and refunds[6]

In *Sunnuck* the Fifth Circuit found that the bar of § 1341 extended to the damage claim before it. It found that a Federal suit for damages would have many of the same detrimental effects on the state's administration of its own taxes as would a claim for injunctive relief, declaratory judgment or refund and that any such

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[5] *Aluminum Co of America* v *Department of Treasury*, 522 F2d 1120 (6th Cir 1975); *City of Houston* v *Standard-Triumph Motor Co*, 347 F2d 194 (5th Cir 1965), *cert denied*, 382 US 974 (1968); *Housing Authority of City of Seattle* v *State of Washington*, 629 F2d 1307 (9th Cir 1980).

[6] *United Gas Pipe Line Co* v *Whitman*, 595 F2d 323 (5th Cir 1979); *Kelly* v *Springett*, 527 F2d 1090 (9th Cir 1975); *Gray* v *Morgan*, F2d 172 (7th Cir 1966).

judicial threats to the state's fiscal operation should come from the state itself.

In contrast to the Fifth Circuit, the Sixth and Seventh Circuits have taken a very narrow view of the interpretation and purposes of § 1341. These circuits have found that actions seeking damages, to which § 1341 would otherwise apply, do not have the disruptive and chilling effects on state taxing processes as do requests for equitable relief or refunds. Nor are the Sixth and Seventh Circuits concerned that the maintenance of such suits would "seriously damage the delicate balance inherent in our federalistic system of government."[7] While the Fifth Circuit believes that, as long as federal rights are protected, principles of comity and federalism suggest that the states must be allowed to handle any threat to their taxing powers, the Sixth and Seventh Circuits believe that there is no less of an intrusion on state sovereignty if the federal courts pose these threats rather than the states.

The effect of the Eighth Circuit affirmance of *Fair Assessment In Real Estate Association* v *McNary*, 622 F2d 415 (8th Cir 1980) affirming 478 F Supp 1231 (E.D. Mo 1979) is to place the Eighth Circuit, which is itself in conflict, with the Fifth Circuit on this issue. The District Court opinion expressly disagreed with the Seventh Circuit opinion in *Fulton Market*, the case on which the Sixth Circuit relied and agreed. The District Court in *McNary* believed that the claim for damages, which was, in part, analogous to a claim for refund, would disrupt the state's collection of its revenue and cause the

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[7] *Fulton Market Cold Storage* v *Cullerton*, 582 F2d at 1078.

state to defend their assessments in Federal Court on mere assertions that the tax was discriminatory. The Court feared that the Federal Courts would become a "source of review of all state property tax classifications. . . . This Court should not interfere in the legitimate interests of the state in implementing its own property tax system."[8]

While not expressly deciding the issue, a court out of the Ninth Circuit has also evidenced a conflict in principle with the holdings of the Sixth and Seventh Circuits. In *Dillon* v *State of Montana*, 634 F2d 463 (9th Cir 1980), a refund suit, the Court found that the jurisdictional bar of § 1341 was broad and that "any effort to obtain tax exemption or adjustment in Federal Court interferes with the fiscal operations of the state."[9] Finding that the practical effect of a refund order was essentially the same as that of equitable relief, the Court found that § 1341 barred the refund suit.

Moreover in *Bormann* v *Tomlin*, 461 F Supp 193 (SD Ill 1978), affirmed 622 F2d 592 (7th Cir 1980), a District Court within the Seventh Circuit was constrained to follow the holding of *Fulton Market Cold Storage* v *Cullerton*, 582 F2d 1071 (7th Cir 1978), *cert denied* 439 US 1121 (1979), but the court expressly disagreed with the holding of the Seventh Circuit.

The Circuits are in real and substantial conflict as to the proper interpretation of 28 USC § 1341, as well as on the principles which are to guide them in applying the statute and its underlying policies. These conflicts justify the grant of certiorari to review the judgment below.

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[8] 478 F Supp at 1234.

[9] 634 F2d at 465.

II

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS WHICH CONCERN THE PROPER INTERPRETATION AND APPLICATION OF 28 USC § 1341, THE RELATED ABSTENTION POLICY, AND THE FEDERAL GOVERNMENT'S REGARD FOR THE AUTONOMY OF THE STATES.

(1) The decision of the Sixth Circuit involves important statutory and policy considerations concerning the extent to which the Federal Courts will involve themselves in the fiscal operations of the states. Judicial and Congressional policy has historically dictated that the states must be allowed to administer their own fiscal operations. *Matthews* v *Rodgers*, 284 US 521 (1932); *Great Lakes* v *Huffman*, 319 US 293 (1943). Since the ability to tax is the means by which the states survive, the federal government has withheld from itself the power to destroy the states' sovereignty except in those cases in which federal rights might otherwise be lost. Thus, both the interests of the states and those of its taxpayers have been protected.

Suits seeking equitable relief, either injunctive or declaratory, have long been barred from the federal courts when they call state taxing procedures into question. This principle was recently reaffirmed by this Court in *Rosewell* v *LaSalle National Bank*, 450 US —, 101 S Ct 1221, 67 L Ed 2d 464 (1981). This prohibition has also generally been applied to suits seeking refunds, which are actions at law for damages. The Sixth Circuit Court of Appeals has, in the case at bar, refused to extend this general principle of comity and federalism to suits at law seeking actual and punitive damages. The

potential ramifications of such a holding are serious for both the state and federal governments, as well as for their citizens.

Any federal plaintiff who seeks to effectively stop a particular state taxing procedure may not do so through an injunction or declaratory judgment. Pursuant to the holding of the Sixth Circuit, he may, however, convert a suit seeking equitable relief, which is barred, into a complaint seeking damages for past wrongs under 42 USC § 1983. The allegations and subject of the complaint remain the same.

In *A Bonding Co* v *Sunnuck*, 629 F2d 1127 (5th Cir 1980), the plaintiff initially sought an injunction. When confronted by a Motion to Dismiss, plaintiff sought to amend its Complaint to ask for declaratory relief and damages. In the case at bar, plaintiff initially sought injunctive relief, declaratory relief, class relief and actual and punitive damages. When confronted with a Motion to Dismiss, plaintiff offered to delete all requests except for actual and punitive damages.

As noted by the Courts in *Bland* v *McHann*, 463 F2d 61 (5th Cir 1972), *cert denied*, 410 US 966 (1972), *A Bonding Co* v *Sunnuck*, 629 F2d 1127 (5th Cir 1980) and *Dillon* v *State of Montana*, 634 F2d 463 (9th Cir 1980), a taxpayer may circumvent the policies of § 1341 by artful pleading. Suits seeking relief under 42 USC § 1983 need not allege nor prove actual damages. In *A Bonding Co* v *Sunnuck*, 629 F2d 1127 (5th Cir 1980) no real damage was shown at trial and the Court awarded the plaintiff one cent in damages. In both the case at bar and in *Advertiser Co* v *Wallace*, 446 F Supp 677 (MD Ala 1978) actual and punitive damages were sought but unspecified. The effect of such suits on state taxing processes may be no less than if a declaratory judgment had been requested.

Since 1978 when *Fulton Market Cold Storage Co* v *Cullerton*, 582 F2d 1071 (7th Cir 1978), *cert denied* 439 US 1121 (1979) was decided, cases seeking damages for state taxing practices appear to be occurring with increasing frequency. At issue here is whether the important policy considerations underlying 28 USC § 1341 apply to these cases. In *Great Lakes* v *Huffman*, 319 US 293 (1943) the Supreme Court expressed concern over the detrimental effects which the mere maintenance of the suit in federal court would have on the states. Whether or not these effects exist and are to be avoided when the federal courts entertain suits which, on their face, seek only damages is a question of importance to both the federal judiciary and the states. Moreover, it is equally important for taxpayers to know with certainty what avenues are open to them when they believe that their federal rights have been infringed.

(2) The decisions of the courts which have interpreted § 1341 demonstrate not only conflict, but confusion as to the doctrines and principles which are to guide them.

Some courts have had difficulty deciding whether it is 28 USC § 1341 itself, or the statute's underlying abstention principles which bar a particular suit from federal court. E.g. *Bland* v *McHann*, 463 F2d 21 (5th Cir 1972), *cert denied*, 410 US 966 (1972) and *Edwards* v *Transcontinental Gas Pipe Line Corp*, 464 F Supp 654 (MD La 1979). Suits seeking declaratory relief have been barred by some courts on the basis of § 1341[10] and by

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[10] *Kistner* v *Milliken*, 432 F Supp 1001 (ED Mich 1977); *Wyandotte Chemical Corp* v *Wyandotte*, 321 F2d 927 (6th Cir 1963).

other courts on the basis of abstention.[11] So too have suits seeking refunds been barred either pursuant to § 1341[12] or through abstention.[13]

Some courts explicitly recognize the existence of an independent, judicially created policy of abstention in cases which may not fall within the literal prohibition of § 1341,[14] while others appear to misunderstand or misapply it.[15]

28 US § 1341 provides a complete jurisdictional bar in those cases to which it applies. On the other hand, the use of abstention suggests a measure of discretion. The confusion and lack of uniformity which appears in the case law indicates a real discrepancy in the way in which cases are handled between and within various circuits.[16] Guidelines are needed to insure uniform treatment.

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[11] *Ludwin* v *City of Cambridge*, 592 F2d 606 (1st Cir 1979); *Independent Baptist Church of Red Bank* v *Tennessee*, 468 F Supp 71 (ED Tenn 1978); *Detroit Edison Company v East China Township School District No 3*, 378 F2d 225 (6th Cir 1967).

[12] *United Gas Pipe Line* v *Whitman*, 595 F2d 323 (5th Cir 1979); *Dillon* v *State of Montana*, 634 F2d 463 (9th Cir 1980).

[13] *Kistner* v *Milliken*, 432 F Supp 1001 (ED Mich 1977).

[14] E.g. *Kistner* v *Milliken*, 432 F Supp 1001 (ED Mich 1977); *Ludwin* v *City of Cambridge*, 592 F2d 606 (1st Cir 1979); *Bland* v *McHann*, 463 F2d 21 (5th Cir 1972), *cert denied*, 410 US 966 (1972).

[15] *Fulton Market Cold Storage Co* v *Cullerton*, 582 F2d 1071 (7th Cir 1978); *cert denied*, 439 US 1121 (1979).

[16] In the 6th Circuit, for example, actions seeking declaratory relief have variously been barred either by § 1341 or by abstention.

Moreover, the recent Supreme Court Case of *Allen* v *McCurry*, 101 S Ct 411 (1980), suggests that the preference some courts have expressed for the resolution of federal issues in federal forums be re-examined.

There has also been confusion and a lack of uniformity in the various courts' analyses of the potential chilling effects which result from these suits on the state's administration of its taxes. Some courts have addressed the issue on a case by case basis while others look to the chilling effects inherent in the class of suits before it. Historically, such concern has not been limited to the actual effect which any one suit may have on the state. The detrimental effects are recognized as inherent to any suit falling within the prohibited category.

A question is also raised as to whether the chilling effects arise solely from the relief requested, or whether the mere maintenance of the suit in federal court has significant chilling effects.

Chilling effects which may be inherent in tax related suits seeking damages, and any resulting harm to the states as a result of such suits, have serious implications on the viability of those principles of federalism and comity which underlie the Tax Injunction Act.

Petitioners respectfully suggest that the courts need principles capable of general application to guide them in reviewing and deciding cases challenging the legality of state tax procedures. Based on such principles, the correctness of the decision of the court below is open to question.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: July 31, 1981

APPENDIX

JUDGMENT

(United States Court of Appeals
For the Sixth Circuit)

(Filed May 14, 1981)

Northwood Apartments, Plaintiff-Appellant, vs. Max LaValley, Thomas Sommerville, Howard Rea, Frank Van Hartsbelt, Donald Lance and City of Royal Oak, Defendants-Appellees. No. 79-1536

Before: MERRITT and BROWN, Circuit Judges; PHILLIPS, Senior Circuit Judge.

JUDGEMENT

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings in accordance with the opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: JUNE 9, 1981

OPINION

(United States Court of Appeals
For The Sixth Circuit)

Decided and Filed May 14, 1981.

Northwood Apartments, Plaintiff-Appellant, v. Max La Valley, Thomas Sommerville and City of Royal Oak, Defendants-Appellees. No. 79-1536 On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: Merritt and Brown, Circuit Judges; Phillips, Senior Judge.

Brown Circuit Judge, delivered the opinion of the Court in which Merritt, Circuit Judge, joined. Phillips, Senior Judge, (pp. 14-23) filed a dissenting opinion.

Bailey Brown, J. Northwood Apartments operates a 121 unit apartment building in the City of Royal Oak, Michigan. On July 27, 1978, Northwood filed a civil rights damage action under 42 U.S.C. §§ 1983 and 1985 and their jurisdictional counterpart, 28 U.S.C. § 1343, in the United States District Court for the Eastern District of Michigan. Northwood alleged that the City of Royal Oak, acting through the city assessor, Max La Valley, and the deputy assessor, Thomas Sommerville, as part of a conspiracy against Northwood, illegally increased Northwood's property assessment with the result that Northwood's taxes were increased by about 20 percent in 1978. Northwood further alleges that the action was in retaliation for Northwood's appeal of the earlier assessments. Northwood contends that, in deliberately and maliciously reassessing the property at a higher value, defendants violated Northwood's constitutional rights to due process, free access to the courts, and equal

protection. The district court, on defendants' motion, dismissed the complaint either for lack of subject matter jurisdiction or alternatively, on abstention grounds.[1] After a thorough review of the record in this case, we find neither ground to be a sufficient basis for the district court's grant of this motion. We therefore reverse the grant of the motion to dismiss for the reasons given below and remand for further proceedings consistent with this opinion.

I

Northwood Apartments is a Michigan copartnership operating in the City of Royal Oak. In 1975, there was a citywide reassessment of apartment properties. Northwood believed that its 1975 assessment was too high and appealed the assessment to the Michigan Tax Tribunal.[2] While the appeal was still pending in 1976, Northwood appended its assessment for 1976, which had not changed from 1975, to the original appeal. In 1977,

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[1] As will be discussed later, the district court never made clear whether it was dismissing the action because of lack of subject matter jurisdiction or whether it was dismissing on abstention grounds.

[2] The Michigan Tax Tribunal is a quasi-judicial entity, consisting of five appointed experts, which as "exclusive and original jurisdiction" of (1) appeals from any final decision, ruling, determination, or order of any agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws, M.C.L.A. § 205.731(a); and (2) any direct "proceeding for refund or redetermination of a tax under the property tax laws," M.C.L.A. § 205.731(b). Proceedings before the Tribunal are considered de novo. M.C.L.A. § 205.735(1). Appeals from final orders and decisions by the Tribunal may be had as of right to the Michigan court of appeals, M.C.L.A. § 205.753, subject to the constitutional restriction that such appeals from "any decision relating to valuation or allocation" may lie only in cases alleging "fraud, error of law or the adoption of wrong principles." Mich. Const. art. 6, § 28.

there was another citywide reassessment of apartment properties, and Northwood's assessment was again increased. Northwood appended the 1977 assessment to its pending appeal. In 1978, although no citywide reassessment of apartment properties was made, Northwood was reassessed and its taxes were increased by about 20 percent. This assessment was also appended to the original appeal.

In May, 1978, the Michigan Tax Tribunal held a hearing on the petitions for reassessment. The Tribunal determined that Northwood made an insufficient showing of protest to the local board of review for the 1977 assessment, and therefore, the Tribunal had no jurisdiction to review the 1977 assessment. This action is not contested here. The assessments for 1975, 1976 and 1978 were taken under consideration.

In July, 1978, as stated, Northwood filed this action for damages alleging violations of 42 U.S.C. §§ 1983 and 1985(3), as well as pendent state law claims for abuse of process and malicious use of process. Northwood alleged that the City of Royal Oak, LaValley, and Sommerville[3] (hereinafter collectively referred to as defendants) intentionally and maliciously reassessed Northwood's property in 1978 to punish Northwood for appealing its earlier assessments and to deter Northwood from further prosecuting its appeal before the Michigan Tax Tribunal. The complaint further alleged:

> The only other apartment owner in the City of Royal Oak who was reassessed in 1978 was another property owner who, like the plaintiff,

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[3] The original complaint named five taxing officials of Royal Oak, but three of these officials were dismissed by stipulation of the parties.

> had appealed its prior years' valuations to the Michigan Tax Tribunal.

The original complaint sought a declaratory judgment and a permanent injunction as well as compensatory and punitive damages, atorney's fees and other costs. Further, Northwood sought class certification to represent persons who owned property in Royal Oak. Before the district court ruled on the motion to dismiss, Northwood withdrew its claim for declaratory and injunctive relief and for class certification.

In September, 1978, the Michigan Tax Tribunal reduced the assessment of Northwood's property for 1975 and for 1976 from $810,000 to $625,000. The 1978 assessment was reduced from $1,028,000 to $750,000[4].

In July, 1979, defendants filed a motion to dismiss. In their briefs and at the hearing, defendants raised two arguments in support of their motion to dismiss. First, they asserted that there was no subject matter jurisdiction as the action was barred by the Tax Injunction Act, 28 U.S.C. § 1341. Second, they argued that even if the action was not barred by the Act, the same policies of federalism and comity which led to the passage of the Act should lead the court, in its discretion, to abstain from accepting jurisdiction. The district court indicated its ruling on the motion from the bench, stating:

> I do abstain because I think this would have, if I entertained jurisdiction in this case we are going to entertain jurisdiction in many cases where

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[4] The Tax Tribunal was affirmed on appeal in *Northwood Apartments* v. *City of Royal Oak*, Mich. App., 296 N.W.2d 639 (1980). No determination was made for 1977 as the Tax Tribunal had already ruled that it had jurisdiction over the 1977 assessment.

> similar claims are made. There may be a good claim in some and maybe not in others I don't know.
>
> The collections are the lifeblood of government, no question about it. They have to have taxes. When federal courts start punishing state officers for the way they perform their function it will not only have a chilling effect but a terrifying effect . . .
>
> I think there is a degree of discretion. However, I believe it would be an abuse of discretion under the circumstances to grant [*sic*] this motion. Even if it would not be abused, if it's one of these areas the court could go either way, I would go this way because I think it's more appropriate knowing you would get a fair trial in state court.

The court subsequently entered a brief order of dismissal in which the only reason given for dismissal was that it appeared to the court that "it should abstain from asserting jurisdiction over this action." Although both the statement from the bench and the order spoke in terms of abstention, the order also provided that "Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction" is granted. As defendants' motion to dismiss contended both that there was no subject matter jurisdiction and, in the alternative, that if there was subject matter jurisdiction, the court should dismiss on abstention grounds, we address both contentions.

For the purposes of their review, the allegations of the complaint are deemed admitted. *Walker Process Equip., Inc.* v. *Food Machinery and Chem. Corp.*, 382 U.S. 172, 174-75 (1965).

II

We deal first with defendants' argument that this action is precluded under the Tax Injunction Act, 28 U.S.C. § 1341. The Act provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State.

The Act expressly prevents the district courts only from enjoining, suspending, or restraining assessment, levy, or collection of taxes. Northwood, however, does not seek to accomplish any of these objectives, either directly or indirectly. Northwood seeks compensatory and punitive damages, costs, and attorney's fees from the city and two city officials, who, according to Northwood' allegations, deliberately overassessed Northwood's property to punish Northwood for appealing its property assessment to the Michigan Tax Tribunal and to discourage Northwood from further prosecuting the appeal. Therefore, we must examine the legislative history of the Tax Injunction Act to determine if the Act impliedly precludes the present damage action.

This same issue, whether the Tax Injunction Act prevented a taxpayer from bringing suit for damages, was examined by the Seventh Circuit in *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979). Plaintiffs in *Fulton*, relying on 42 U.S.C. § 1983, alleged that the Cook County Assessor "systematically, knowingly, intentionally, fraudulently and invidiously assessed its

property at levels other than permitted by law and greatly in excess of the levels at which property in Cook County was generally assessed." 582 F.2d at 1073. The district court dismissed the complaint relying on the Tax Injunction Act or alternatively on the Act's underlying policy considerations. Plaintiffs appealed, and the Seventh Circuit reversed, holding that the Tax Injunction Act did not bar a § 1983 action for damages. In so holding, the Seventh Circuit carefully reviewed the legislative history as well as the cases decided under the Act. See 582 F.2d at 1074-80. *See also United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323 at 324-30 (5th Cir. 1979). Thernore, we will not set out in detail in this opinion the history of the Tax Injunction Act.

Reviewing the history of the Act, we conclude, as did the Seventh Circuit, that the purpose of the Tax Injunction Act was to bar any action for equitable relief which would disrupt the state taxing process.

The report of the Senate Judiciary Committee, U.S. S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937), as summarized in *Tramel* v. *Schrader*, 505 F.2d 1310 (5th Cir. 1975), reveals that the Tax Injunction Act was aimed at two basic problems.

> First, Congress noted that some foreign corporations were in the habit of delaying the payment of taxes through an action in federal court since they could invoke diversity jurisdiction. State citizens, on the other hand, could not obtain a federal forum based on diversity jurisdiction. By passing the Tax Injunction Statute, Congress sought to treat the two classes, foreign corporations and resident citizens, alike.

> Second, Congress noted that allowance of injunction suits in the federal courts inevitably resulted in delays in the collection of public revenues by the state and local governments. Because of pressing need for the money, the state and local governments often had to compromise the claims, taking less than what was, in fact, due. By closing the federal courthouse door to taxpayer claims, Congress sought to end this burdensome disruption of local financing.

505 F.2d at 1316.

The first problem is not relevant to the present suit as Northwood is not alleging diversity as a basis for jurisdiction. The second problem is not a present concern as Northwood had successfully contested the assessment in state court and had been awarded a refund at the time the district court heard the motion to dismiss. Delay in the collection of taxes was not at issue in this suit.

We note that the policies underlaying the Tax Injunction Act have been found to be a basis for exercising discretion in refusing to grant declaratory relief even though such relief is not expressly proscribed under the Act. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943). The rationale of *Great Lakes* was further discussed in Justice Brennan's concurring opinion in *Perez* v. *Ledesma*, 401 U.S. 82 (1971):

> *Great Lakes* adhered to the congressional recognition of the unique considerations presented by anticipatory tax litigation . . . As the statutes barring anticipatory relief in federal tax cases . . . make entirely clear, the unique considerations that were the basis of *Great Lakes*

> relate not so much to considerations of federalism as to the peculiar needs of tax administration.

401 U.S. at 127.

Applying the rational of *Great Lakes*, further explained in *Perez*, to the present controversy, we still find no basis for barring federal jurisdiction in this instance. Northwood does not seek anticipatory relief, nor will this action have disruptive effect on state taxation procedures.

In light of the legislative history and the reasoning of the Seventh Circuit in *Fulton*, with which we agree, we conclude that the Tax Injunction Act is not a bar to subject matter jurisdiction in the present § 1983 and § 1985 suit.

III

Defendants contend, and the district court indicated, that even if Northwood has a right to recover, the availability of a state forum in which Northwood may prosecute the present action provides a sufficient remedy and therefore is a proper basis for abstention. We disagree.

In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), a district court remanded a diversity case to the state court in which it had originally been brought on the grounds that there was "no available time in which to try the above-styled action in the foreseeable future" and that an adjudication on the merits would be expedited in the state court. The Supreme Court, in reviewing the remand, held that

> [A]n otherwise properly removed action may no more be remanded because the district court

> considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.

423 U.S. at 344.

The argument that a federal right of action, specifically created under § 1983, may be dismissed because a state remedy to enforce such cause of action is available is even less persuasive than the argument that a diversity case may be dismissed or remanded because the state provides a clear remedy. Thus, the notion that the availability of a state court remedy is a proper basis for abstention is incorrect.

The Supreme Court noted in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), that the failure of state courts to vindicate federal rights was one of the primary motivations for passage of the statute which was a predecessor to § 1983. Further, we note that a district court's entertaining of § 1983 and § 1985 damage actions, unlike the declaratory judgment action in *Great Lakes*, is not a matter for the excercise of discretion.

Defendants claim that even if the present action is not precluded by the Tax Injunction Act, the federal court should still abstain from asserting jurisdiction because of the general policies of federalism and comity.

In support of this contention, defendants again cite the holding in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943). We note, however, that the question in *Great Lakes* was whether the Tax Injunction Act proscribed the issuance of a declaratory judgment in a context in which the Act was otherwise clearly applicable. The Court stated that it was not necessary to determine judgments, proscribed the issuance of such

judgments. The Court held that since the policy of abstaining in these circumstances was in existence prior to the Act, it was an improper exercise of discretion to issue a *declaratory* judgment which would contravene the purposes of the Act. The Court reasoned that accepting jurisdiction in such actions

> may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.
> 399 U.S. at 299.

The present § 1983 and § 1985 action would not have the practical effect of suspending collection of state taxes.

In the recent Sixth Circuit case of *Hanna* v. *Toner*, 630 F.2d 442 (1980), this court carefully examined the general theories underlying the abstention doctrine. 630 F.2d at 444-46. This court quoted from *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813-14 (1976):

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.

> Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1963, 3 L.Ed.2d 1163 (1959). '[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.' *Alabama Pub. Serv. Comm'n.* v. *Southern R. Co.*, 341 U.S. 341, 361, 71 S.Ct. 762, 774, 95 L.Ed. 1002 (1951) (Frankfurter, J., concurring in result).

Defendants have not shown any "extraordinary" circumstances involved in the present suit which would warrant abstention. Further, a review of the general grounds for abstention shows no general accepted theory of abstention applicable in the present action.

A federal court may abstain where there are unsettled questions of state law which, if settled by the state, would avoid the necessity of deciding the matter of a federal constitutional law ground. *Railroad Comm'n. of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

A federal court may also abstain where accepting jurisdiction would create needless conflict with state policies in areas of basic concern to the states, and the federal adjudication in the area would disrupt state efforts to establish its own policy with respect to matters of substantial public concern. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Abstention is also appropriate to avoid duplicative litigation. *Colorado River Wate* [*sic*] Con. Dist. v. *United States*, 424 U.S. 800 (1976).

A final ground for abstention is to further the policies of federalism or comity. That is, a federal court should abstain, except under extraordinary circumstances, where exercising jurisdiction would frustrate a pending state court proceeding. *Younger* v. *Harris*, 401 U.S. 37 (1971).

None of the above abstention doctrines apply to the present suit.

Defendants contend an additional consideration supporting abstention is that allowing a § 1983 action to proceed in state court would be less of an intrusion on state sovereignty. We note that it is hardly less of an intrusion on state sovereignty in this context for a state court to adjudicate this § 1983 and § 1985 cause of action than for the federal court to adjudicate the action.

Defendants finally contend that allowing the federal courts to entertain the present action will have an undesirable chilling effect on officials who administer state tax assessments. We see no reason, however, to believe that allowing the same action to proceed in state court would have a less chilling effect on state officials except to the extent that they believe a state court would be less vigorous in vindicating plaintiff's § 1983 and § 1985 rights.

IV

The dissent would hold that the district court did not have "jurisdiction" because the complaint did not state a claim for relief under the statutes relied upon by Northwood. However, as recognized by the dissent, the contention that the complaint did not state a claim was contained in defendants' answer, while the district court ruled only on a motion to dismiss. This motion raised the question under Rule 12 (b)(1), Fed. R. Civ. P., relying

on the Tax Injunction Act, whether the district court had subject matter jurisdiction. More to the point, the district court *had* subject matter jurisdiction even if the complaint did not state a claim since the right of Northwood to recover depends upon an interpretation of the Constitution and laws of the United States. *Wheeldin* v. *Dawson*, 373 U.S. 647 (1963); 5 Wright & Miller, Federal Practice & Procedure, § 1350, note 54. Accordingly, even if we agreed that the complaint does not allege a claim, we could not, as the dissent would have us do, dismiss for lack of subject matter jurisdiction.

V

We hold that the Tax Injunction Act does not justify dismissal for lack of subject matter jurisdiction. Further, we determine that no abstention doctrine applies to this proceeding.

We point out that while the district court impliedly assumed that the complaint states a claim for relief, it never so determined, as the issue was not before it on this motion to dismiss. This question is not presently before us, we do not rule on the question, and we indicate no opinion whether the complaint states a claim for relief under the federal statutes relied upon.[5]

We reverse and remand for further proceedings in accordance with this opinion.

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[5] See in this connection *Rosewell* v. *LaSalle National Bank*, — U.S. —, 49 U.S.L.W. 4285 (March 24, 1981), and particularly the dissenting opinion of Justice Stevens at 4292, and *Fulton Market Cold Storage Co.*, *supra*, as well as *A. Bonding Co.* v. *Sunnuck*, 629 F.2d 1127 (5th Cir. 1980), cited by the dissent.

Phillips, Senior Circuit Judge. (Dissenting.) I respectfully dissent. I would affirm the dismissal of the action on the ground that the district court did not have subject matter jurisdiction under 42 U.S.C. § 1983 or § 1985. The majority opinion expressly reserves a decision of this question.

I

In their answer to the complaint the defendants included the following affirmative defense: "Plaintiff has failed to state a cause of action under 42 U.S.C. § 1983, 42 U.S.C. § 1985 or State law."

On July 20, 1979, the defendants, City of Royal Oak, Max La Valley, the city's tax assessor, and Thomas Sommerville, the city's deputy tax assessor, filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(1) on the ground that "this court lacks subject matter jurisdiction."

On September 12, 1979, the district court entered the following order:

> This matter having come before the Court on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure briefs having been submitted by the parties and all parties having had the opportunity to be heard, and it appearing to the Court that it should abstain from asserting jurisdiction over this action:
>
> WHEREFORE, IT IS HEREBY ORDERED that Defendants' Motion To Dismiss For Lack of Subject Matter Jurisdiction is granted, with prejudice.

As the majority opinion points out, the oral decision of the district court, announced from the bench, is not clear as to whether the action was dismissed (1) as precluded by the Tax Injunction Act, 28 U.S.C. § 1341, (2) or on the ground that the court did not have subject matter jurisdiction, or (3) as barred by the doctrine of abstention. The majority opinion reverses on the abstention and Tax Injunction Act issues and reserves a decision on the question of whether the district court had subject matter jurisdiction under 42 U.S.C. §§ 1983 or 1985. I prefer to decide the appeal on the ground that the district court did not have subject matter jurisdiction.

Even if the majority opinion is correct in holding that the issue of subject matter jurisdiction is not before this court, we are required to consider that question independently and on our own motion. *Mansfield, Coldwater & Lake Michigan Railway Co.* v. *Swan*, 111 U.S. 379, 382 (1884); *Brown* v. *Keene*, 33 U.S. (8 Peters) 112 (1834); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126 (1804); *Jones* v. *Perrigan*, 459 F.2d 81, 83 (6th Cir. 1972).

I would hold that §§ 1983 and 1985 do not confer subject matter jurisdiction to decide an action by a taxpayer against a local tax assessor for damages on the ground that the assessment of the taxpayer has been increased because the taxpayer sought review of prior assessments. I do not believe that an increased tax assessment, even if made in bad faith by a state or local tax official, is a constitutional violation within the contemplation of the civil rights statutes.

In the present case the taxpayer has an adequate remedy under state law. The remedies provided by the laws of Michigan are set forth in detail in the comprehensive opinion of District Judge Charles W. Joiner in *Kistner* v. *Milliken*, 432 F. Supp. 1001 (E.D.

Mich. 1977), holding that Michigan provides a plain, speedy and efficient remedy for taxpayers complaining of tax assessments.

It is a well established principle that the federal courts will not interfere in the assessment and collection of state and local taxes where an adequate remedy is available in the state courts. It, therefore, is inconceivable to me that, by the enactment of §§ 1983 or 1985, Congress intended to subject tax assessors to actions for damages for excessive tax assessments, even if made in bad faith.

In *Matthews* v. *Rodgers*, 284 U.S. 521, 525-26 (1932), Mr. Justice Stone wrote for a unanimous court:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal questions be involved, Jud. Code § 237, or to his suit at law in the federal jurisdiction are present. *See Boise Water Co.* v. *Boise City*, 213 U.S. 276; *Shelton* v. *Platt*, 139 U.S. 591; *Dows* v. *Chicago*, 11 Wall. 108, 110, 112.

To like effect see *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298 (1943); *Helmsley* v. *City of Detroit*, 320 F.2d 476 (6th Cir. 1963). See, also *Rosewell* v. *LaSalle National Bank*, — U.S. —, —, 49 U.S.L.W. 4285, 4292 (March 24, 1981).

I would follow *Dillon* v. *State of Montana*, 634 F.2d 463 (9th Cir. 1980), and *A. Bonding Co.* v. *Sunnuck*, 629 F.2d 1127 (5th Cir. 1980) and hold that state and local tax assessments cannot be attacked, directly or indirectly, under §§ 1983 or 1985, where there is an adequate remedy under State law. *See also Ludwin* v. *City of Cambridge*, 592 F.2d 606 (1st Cir. 1979); *Bland* v. *McHann*, 463 F.2d 21 (5th Cir.), *cert. denied*, 410 U.S. 966 (1972). To the extent that *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979), may be construed to hold to the contrary, I would decline to follow it.

Sections 1983 and 1985 were never intended as a catch-all under which a myriad of suits, traditionally within the exclusive jurisdiction of state courts, can be brought in the federal courts. Under §§ 1983 and 1985 there must be a showing of a clear deprivation of a constitutional right. *Ryan* v. *Aurora City Board of Education*, 540 F.2d 222, 225 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Jurisdiction cannot be attained in the federal courts by the procedural device of filing an insubstantial action under §§ 1983 and 1985. *Bates* v. *Dause*, 502 F.2d 865, 867 (6th Cir. 1974).

In *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979), the Supreme Court said: "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' "

The Supreme Court recently emphasized the limitations on litigation filed under § 1983 in a decision applying the rules of collateral estoppel to § 1983 actions. In *Allen* v. *McCurry*, — U.S. —, 101 S.Ct. 411, 66 L.Ed 2d 308 (1980). The Court wrote:

> Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, see *Monroe* v. *Pape*, 365 U.S. 167, 174, and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights, *Mitchum* v. *Foster*, 407 U.S. 225, 241-242; *Monroe* v. *Pape, supra*, 365 U.S., at 180. But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.
>
> As the Court has understood the history of the legislation, Congress realized that in enacting

§ 1983 it was altering the balance of judicial power between the state and federal courts. See *Mitchum* v. *Foster, supra*, 407 U.S., at 241. But in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. See *Monroe* v. *Pape, supra*, 365 U.S., at 183 ("The federal remedy is supplementary to the state remedy . . ."). The debates contain several references to the concurrent jurisdiction of the state courts over federal questions, and numerous suggestions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.

To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe* v. *Pape, supra*, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice, 365 U.S., at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of

constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. See text, at n. 7, *supra*. Bu the Court's view of § 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.

* * *

The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its

> proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings. There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all. (Footnotes omitted). — U.S. at —, 101 S.Ct. pp. 417-20.

Among the many other examples of restrictions on jurisdiction under § 1983 or § 1985 are: *Martinez* v. *California*, 444 U.S. 277 (1980) (state officials not liable for murder committed by paroled sex offender); *Baker* v. *McCollan*, 443 U.S. 137 (1979) (false imprisonment pursuant to valid arrest warrant); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (medical malpractice claim by inmate against prison official); *Paul* v. *Davis*, 424 U.S. 693 (1976) (defamatory flyer of "active shoplifters" distributed by city police); *Stevens* v. *Hunt*, (No. 80-1238, 6th Cir. April 20, 1981) (academic dismissal of medical students by Dean of Medical School for twice failing to pass examination of National Board of Medical Examiners); *Studen* v. *Beebe*, 588 F.2d 560 (6th Cir. 1978) (city officials rezoning from three-tiered to single residence zone); *Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979) (prison inmate stabbed by another inmate due to inadequate search of prisoners); *Bonner* v. *Coughlin*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978) (negligent search of prisoner's cell

resulting in loss of his trial transcript); *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) (state officials' tortious interference with contract between plaintiff and state); *Kelly* v. *Springett*, 527 F.2d 1090 (9th Cir. 1975) (post-arrest seizure of taxpayer's funds and bank account for unpaid state income taxes); *Coe* v. *Bogart*, 519 F.2d 10 (6th Cir. 1975); (transfer of school principal without notice of charges or hearing); *Manchester* v. *Lewis*, 507 F.2d 289 (6th Cir. 1974) (discharge of untenured teacher because of unsatisfactory teaching performance); *Denman* v. *Leedy*, 479 F.2d 1097 (6th Cir. 1973) (intrafamily child custody battle).

II

Although the majority opinion cites persuasive authority to the contrary, I would hold further that the present action is barred by the Anti-injunction Statute. I agree with the reasoning of *A. Bonding Co.* v. *Sunnuck*, *supra*, 629 F.2d 1127 (1980), involving an action under 42 U.S.C. § 1983 to recover money damages from local tax officials for tortious enforcement of an allegedly unconstitutional tax. The Fifth Circuit, holding that the action was barred by the Anti-injunction Statute, 28 U.S.C. § 1341, wrote:

> Section 1341 has been construed to be much broader than its words initially suggest. As we noted in *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 326 (5th Cir. 1979): "The concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts." The purpose of section 1341 is "to protect the integrity of the state treasury . . ." *Hargrave* v.

McKinney, 413 F.2d 320, 326 (5th Cir. 1969). "[T]he history of section 1341, from its precursor federal equity practice to its most current judicial construction, evidences that it is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems." *United Gas*, 595 F.2d at 326.

* * *

A federal court suit for damages against a state tax administrator, based on the theory that the administrator tortiously enforced an unconstitutional tax, would have many of the same detrimental effects that actions for tax refund, declaratory, or injunctive relief would have. Although the federal court's decision in such a case technically would bind only the immediate parties, as a practical matter it would undoubtedly dampen future state collection efforts. Once a tax provision has been found invalid, and a state official has been held liable for its application, collecting officials will "doubtless stop asserting rights to taxes under that section, as surely as if collection under it had been formally enjoined." *United Gas*, 595 F.2d at 329-30. As with refund actions, there is no way to predict the full impact of such litigation, but as we held in *United Gas*,

> the threat exists that any such litigation could put substantial portions of a state's revenue or broadly applicable sections of a state's tax code in jeopardy. The policy of section 1341 is that such judicial threats should come only from state courts when the state provides taxpayers

> a remedy that is plain, speedy and efficient. Review of such state court decisions in the United States Supreme Court remains available to preserve whatever substantial federal rights may be implicated.

595 F.2d at 330.

The district court's award of damages is especially disruptive in this case, since the court expressly reserved jurisdiction to assess further damages in the future should the defendants persist in enforcing the one-percent tax. The effect of this ongoing jurisdiction is virtually the same as that of an injunction. Further, the district court's imposition of one-cent nominal damages indicates that the plaintiff was unable to show real damage at the time of the suit. The claim for damages was plainly an attempt to circumvent the prohibitions of section 1341; it did not change the true nature of the case. *See 28 East Jackson Enterprise, Inc.* v. *Collector*, 523 F.2d 439, 440-41 n. 2 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 856, 47 L.Ed.2d 83 (1976).
629 F.2d at 1133-34.

If local tax assessors must live under threat of an action for damages pursuant to § 1983 or § 1985 every time they increase the tax assessment of a disgruntled taxpayer, the consequences on state and local tax revenues could be even more disatrous than a federal court injunction against increases in local tax assessments .I believe the present action is barred by the Anti-injunction Statute.

I agree with the majority opinion that abstention by the district court is not appropriate in the present case.

For the reasons indicated, I would affirm the decision of the district court dismissing the complaint.

OPINION

(United States District Court
For the Eastern District of Michigan
Southern Division)

Northwood Apartments, et al., Plaintiffs, v Max LaValley, et al., Defendants. No. 78-71880.

Motion to dismiss in the above-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, August 31, 1979.

APPEARANCES: Thomas J. Beale, Esq., Appearing on behalf of Plaintiff.

Rosalind Rochkind, Esq., Milton Lucow, Esq., Appearing on behalf of Defendants.

* * *

(25) The Court: In the first place there isn't any question the Court should dismiss a part of the complaint that is not disputed, the portion of the complaint in which an injunction is sought, but while it is not disputed it hasn't been done yet.

The suit was brought and the motion is filed and to that extent the Court is confident it is appropriate to dismiss that portion of the claim.

Also, I think it's fair to say while Judge Joiner's opinion is of great interest to the Court it is not a controlling precedent. It wouldn't be a controlling precedent anyway. The situation is not the same because the relief sought here is broader. The relief sought here is under 1983 in which it really creates not the right but the remedy. The right is created by the Constitution, the

remedy is created by the statute which has been construed to include punitive damages.

Frankly, I can't think of anything that would have a greater chilling effect by the federal government on the function of state government than for federal courts to start imposing punitive damages or punishing by money judgment, state officers for the manner in which they function in the collection of state taxes, as long as there is a plain, speedy and adequate remedy in state court.

I understand counsel's problem about (26) trying to get the state judge to change his ways and apply federal law. That is the job for the advocate. You are good advocates here. I'm not concerned. It wouldn't occur in this case. There is no reason why these claims cannot be brought in state court including the 1983 action.

Counsel isn't concerned about any statute of limitation problem or the fact they would be precluded by the tax commission so there is no reason to retain jurisdiction. I do abstain because I think this would have, if I entertained jurisdiction in this case we are going to entertain jurisdiction in many cases where similar claims are made. There may be a good claim in some and maybe not in others. I don't know.

The collections are the lifeblood of government, no question about it. They have to have taxes. When federal courts start punishing state officers for the way they perform their function it not only will have a chilling effect but a terrifying effect.

When I was practicing law I knew one judge we could get a dismissal from merely by filing an appearance and asking for a jury. They were so afraid of lawyers. That isn't justified but in this case it could have an extremely chilling effect upon the functioning of state government if this Court entertain jurisdiction and particularly if a judgment was granted there would be a (27) flood of

these cases with substantial interference and pretty soon we would be trying all manner of cases against state officers in the collection of taxes.

It was a well argued case. I think there is a degree of discretion. However, I believe it would be an abuse of discretion under the circumstances for the Court to grant this motion. Even if it would not be abused, if it's one of these areas the Court could go either way I would go this way because I think it's more appropriate knowing you would get a fair trial in state court.

Mr. Lucow: Thank you.

The Court: Will you prepare the order?

Ms. Rochkind: Yes, your Honor.

Certificate

I, Donald E. Miller, Official Court Reporter, hereby certify I reported in shorthand the proceedings had in the within-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, August 31, 1979, and that the foregoing is a full, true and correct transcript of my shorthand notes taken at said time and place.

Donald E. Miller
211 Federal Building
Detroit, Michigan

Dated: September 11, 1979

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed September 12, 1979)

Northwood Apartments, a Michigan co-partnership, for itself and on behalf of all others similarly situated, Plaintiff, vs. Max LaValley, Thomas Sommerville and City of Royal Oak, Defendants. No. 871880. Hon. James F. Churchill.

At a session of said Court, held in the Federal Building, City of Detroit, State of Michigan, on Sept. 12, 1979.

PRESENT: Honorable James P. Churchill, District Court Judge.

This matter having come before the Court on Defendants' Motion To Dismiss for Lack of Subject Matter Jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, briefs having been submitted by the parties and all parties having had the opportunity to be heard, and it appearing to the Court that it should abstain from asserting jurisdiction over this action;

WHEREFORE, IT IS HEREBY ORDERED that Defendants' Motion To Dismiss For Lack of Subject Matter Jurisdiction is granted, with prejudice.

JAMES P. CHURCHILL
DISTRICT COURT JUDGE

Approved as to form

By: /s/ THOMAS J. BEALE, P10577
Attorney for Plaintiff

JUDGMENT OF DISMISSAL

(United States District Court
Eastern District of Michigan
Southern Division)

(Fild September 12, 1979)

Northwood Apartments, a Michigan co-partnership, for itself and on behalf of all others similarly situated, Plaintiff, vs. Max LaValley, Thomas Sommerville and City of Royal Oak, Defendants. No: 871880. Hon. James F. Churchill.

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on Sept. 12, 1979.

PRESENT: Honorable James P. Churchill, District Court Judge.

The Motion of Defendants, City of Royal Oak, Max LaValley and Thomas Sommerville, to dismiss for lack of subject matter jurisdiction having been heard and the Court having found that it should abstain from ascerting [*sic*] jurisdiction over this action,

IT IS ORDERED that this matter is hereby dismissed, with prejudice.

JAMES P. CHURCHILL
DISTRICT COURT JUDGE

Approved as to form

By: /s/ THOMAS J. BEALE P10577
Attorney for Plaintiff

Opposition

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-272 ——

IN THE

Supreme Court of the United States

October Term, 1981

MAX LaVALLEY, THOMAS SOMMERVILLE AND CITY OF ROYAL OAK,

Petitioners,

v.

NORTHWOOD APARTMENTS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

DOES 28 U.S.C. § 1341 APPLY TO BAR THE MAINTENANCE OF AN ACTION IN FEDERAL DISTRICT COURT FOR DAMAGES ONLY UNDER 42 U.S.C. §§ 1983, 1985, WHENEVER THE INSTRUMENT OF ABUSE IS THE STATE'S TAXATION POWER?

II

DO THE POLICIES UNDERLYING 28 U.S.C. § 1341 REQUIRE A FEDERAL DISTRICT COURT TO DECLINE JURISDICTION OF AN ACTION FOR DAMAGES ONLY UNDER 42 U.S.C. §§ 1983, 1985 WHERE THE PLAINTIFF HAS ALREADY PREVAILED IN THE STATE COURTS ON THE TAXATION ISSUES?

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No. 81-272 —

IN THE

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October Term, 1981

MAX LaVALLEY, THOMAS SOMMERVILLE AND CITY OF ROYAL OAK,

Petitioners,

v.

NORTHWOOD APARTMENTS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

Respondent Northwood Apartments, a Michigan co-partnership, ("Respondent") accepts the statement of the case presented by Petitioners LaValley and Sommerville ("Petitioners") as accurate, subject to the following qualifications.

On pages 4-5 of the Petition for a Writ of Certiorari ("Petition"), Petitioners state that in the complaint filed in the district court

> Respondent alleged, for the first time, that Petitioners had reassessed its property in 1978, a year in which there was no city-wide reassessment, in retaliation for Respondent's appeal of prior years' assessments to the Michigan Tax Tribunal. * * * The allegations contained in this Complaint had not been raised before the Tax Tribunal.

Any implication that Respondent could have and should have presented its claims of violations of 42 U.S.C. §§ 1983, 1985 in its appeal to the Michigan Tax Tribunal would be without merit as actions under 42 U.S.C. §§ 1983, 1985 do not arise "under property tax laws."[1]

The complaint alleges that of the approximately 300 apartment developments in Royal Oak, the only two whose assessed valuations were increased in 1978 were the only two whose assessed valuations for prior years were being challenged in the Michigan Tax Tribunal. Complaint, ¶ 16. The complaint further alleges that the Petitioners have adopted an official course of conduct

---

[1] Mich. Comp. Laws Ann. § 205.731 provides in its entirety as follows:

> The Tribunal's exclusive and original jurisdiction shall be:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax law.

to substantially increase the assessed value of properties owned by persons who challenge assessments in the Michigan Tax Tribunal, depriving Respondent of due process, free access to judicial bodies and equal protection of the law. Complaint, ¶ 18.

To facilitate understanding of the history of this action, the following is a chronological order of the proceedings in the courts and tribunal below:

(1) In May of 1975 Respondent filed its appeal of its 1975 tax assessment with the Michigan Tax Tribunal. Subsequently, tax years 1976, 1977 and 1978 were added to the appeal.

(2) In May of 1978 the Michigan Tax Tribunal conducted a hearing on the Respondent's claims of overassessment. It was through the testimony of the Petitioners at this hearing that Respondent first learned of the Petitioners' discriminatory tax assessment increases.

(3) On July 27, 1978 the complaint was filed in the district court.

(4) In September of 1978 Respondent received a favorable judgment from the Michigan Tax Tribunal, which reduced Respondent's 1975 and 1976 assessments from $810,000 to $625,000. The 1978 assessment was reduced from $1,028,000 to $750,000.

(5) In July of 1979 the Petitioners filed their motion to dismiss in the district court. Oral argument was heard on the motion on August 31, 1979. The Order Granting Defendants' [Petitioners'] Motion to Dismiss with Prejudice and Judgment of Dismissal were filed in the district court on September 12, 1979.

(6) On September 20, 1979 Respondent filed its Notice of Appeal in the district court.

(7) In July of 1980 the Michigan Court of Appeals affirmed the decision of the Michigan Tax Tribunal. *Northwood Apts* v. *City of Royal Oak*, 98 Mich. App. 721, 296 N.W.2d 639 (1980).

(8) On February 5, 1981 oral argument was heard in the 6th Circuit. On May 14, 1981 the 6th Circuit filed its Opinion reversing and remanding the action to the district court. *Northwood Apts* v. *LaValley*, 649 F.2d 401 (6th Cir. 1981). Thereafter, Petitioners filed the Petition.

In Respondent's brief in opposition to the Petitioners' motion to dismiss filed in the district court, and during oral argument on the motion, counsel for Respondent ceded the claim for declaratory relief and the request for class certification.

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AS TO THE SCOPE AND APPLICATION OF 28 U.S.C. § 1341, OR WITH THE STATUTE'S UNDERLYING POLICY CONSIDERATIONS.

Section 1341 of chapter 28 of the United States Code provides that:

> The District Courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such state.

The statute is often referred to as the "Tax Injunction Act." The text of the statute only applies to actions to "enjoin, suspend or restrain" state taxation procedures. *Id.* This Court and every circuit court of appeals have consistently held that actions to enjoin state taxation procedures may not be maintained in federal district courts where the state court remedy is plain, speedy, and efficient. All the circuits are in agreement that section 1341 bars actions for tax refunds in federal district courts where the state action is plain, speedy, and efficient. *United Gas Pipeline Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas*, 493 F.2d 1397 (2d Cir. 1974); *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966).

This Court and all the circuit courts of appeal agree that equitable actions seeking prospective relief, such as a declaratory judgment, while not barred by the text of the Tax Injunction Act, are barred by considerations of federalism, comity, and the "peculiar needs of tax administration." *Perez* v. *Ledesma*, 401 U.S. 82, 127, 27 L. Ed. 2d 701, 729-730 (1971) (Mr. Justice Brennan, concurring in part and dissenting in part); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 87 L. Ed. 1407 (1943); *Housing Auth of Seattle* v. *State of Washington*, 629 F.2d 1307 (9th Cir. 1980); *Ludwin* v. *City of Cambridge*, 592 F.2d 606 (1st Cir. 1979); *Aluminum Co. of America* v. *Dept. of Treasury of Mich.*, 522 F.2d 1120 (6th Cir. 1975). Therefore, it is clear that all federal courts are in accord that the Tax Injunction Act and the principles of federalism and comity which gave rise to the Act preclude actions in federal district courts where the relief requested is an injunction, a refund, a declaratory judgment, or other such relief having prospective application, or where the relief requested would impede or disrupt state tax administration.

Neither the Tax Injunction Act nor any principle of federalism or comity precludes a damages action at law pursuant to 42 U.S.C. §§ 1983, 1985. Respondent's action does not disrupt the flow of tax revenue, does not interfere with state tax administration, does not seek prospective relief, and does not seek a determination of the validity, legality, or correctness of the assessment itself. The correctness of the assessment and the claim for a refund were the subject of Respondent's proceedings before the Michigan Tax Tribunal. The complaint requests no interference with the state's taxation procedures.

Petitioners rely on one circuit court opinion to establish the alleged conflict between the circuits as to whether the Tax Injunction Act precludes an action at law for damages under 42 U.S.C. §§ 1983, 1985. Petitioners state that the

> ruling of the Sixth Circuit is in conflict with the decision of the Fifth Circuit Court of Appeals in *A Bonding Company* v *Sunnuck*, 629 F2d 1127 (5th Cir 1980) and with the affirmance of the District Court's ruling by the Eighth Circuit in *Fair Assessment In Real Estate Association, Inc.* v *McNary*, 478 F Supp 1231 (E. D. Mo 1979), affirmed 622 F2d 415 (8th Cir 1980), *cert granted*, 4/6/81 49 USLW 3743.

Petition at 8.

Sunnuck was an action seeking to enjoin the levy of a bail bond business license tax by the City of Birmingham, Alabama. At the close of trial, plaintiff amended the complaint to add prayers for declaratory relief and money damages. The trial court granted the injunction and issued a declaratory judgment that

the statute under which the tax was levied was unconstitutional.

Sunnuck is patently distinguishable from the case at bar. Respondent in this case seeks civil rights damages only. The forms of relief requested in *Sunnuck* were an injunction and a declaratory judgment. The former is expressly barred by the text of the Tax Injunction Act. The latter is barred under principles of federalism and comity as expressed in *Great Lakes Dredge & Dock Co.* v. *Huffman, supra*. The appellate court held that the post trial "claim for damages was plainly an attempt to circumvent the prohibitions of section 1341; it did not change the true nature of the case." 629 F.2d at 1134 (citation omitted).

The 5th Circuit in *Sunnuck* expressly refrained from deciding whether the Tax Injunction Act precludes an action for damages under 42 U.S.C. §§ 1983, 1985:

> Without deciding whether section 1341 precludes all suits for damages against administrators of state and local taxes, we find that this statute does deprive the district court of jurisdiction in this case.

629 F.2d at 1132-33. The *Sunnuck* court further declined to decide whether the principles of federalism and comity preclude the maintenance of a damages action under 42 U.S.C. §§ 1983, 1985: "We also decline to decide whether federal common law principles prohibit federal courts from taking such suits for damages." *Id.* at 1133 n. 6 (citation omitted).

Thus, the only circuit court of appeals case relied upon by Petitioners to establish a conflict among the circuit courts of appeal expressly declined to address the issues upon which Petitioners urge there exists a conflict.

Nor may Petitioners rely upon the 8th Circuit case *Fair Assessment In Real Estate Ass'n* v. *McNary*, 478 F. Supp. 1231 (E.D. Mo. 1979), (affirmed by an equally divided court *en banc* without opinion at 622 F.2d 415 (8th Cir. 1980), *cert. granted*, 4/6/81 49 U.S.L.W. 3743) to establish a conflict. The district court in *McNary* properly found that the relief requested was in fact an action for a refund of alleged overpayment. 478 F. Supp. at 1233. The court further held that "[t]o allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief." *Id.*

Petitioners fail to cite a single circuit court of appeals case holding contrary to the 6th Circuit's opinion in this case, the 7th Circuit's opinion in *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied* 439 U.S. 1121, 59 L. Ed. 2d 82 (1979), and the 1st Circuit's opinion in *Ludwin* v. *City of Cambridge*, 592 F.2d 606 (1st Cir. 1979). The circuit courts of appeal uniformly hold that the Tax Injunction Act does not bar damages actions at law arising under 42 U.S.C. §§ 1983, 1985.

As shown by the chronology set forth in Respondent's Statement of the Case, Respondent prevailed on the tax issues in the state tribunal and court independently of this action. When this case was heard by the 6th Circuit, respondent had already received its tax refund. There can be no suggestion that Respondent is now seeking a refund disguised as civil rights damages, or that this action is a masked attempt to interfere with the state's taxation process. In this respect the case at bar is uniquely distinguishable from all cases relied upon by Petitioners.

II

THE DECISION BELOW DOES NOT RAISE PROBLEMS RELATING TO THE FEDERAL GOVERNMENT'S REGARD FOR THE AUTONOMY OF THE STATES.

The Petition correctly states that a federal plaintiff may not stop a state taxing procedure through an injunction or declaratory judgment. Petition at 13. Petitioners further state that pursuant to the opinion and holding of the appellate court below, the federal plaintiff

> may, however, convert a suit seeking equitable relief, which is barred, into a complaint seeking damages for past wrongs under 42 USC § 1983. The allegations and subject of the complaint remain the same.

Id. This assertion ignores fundamental distinctions between a complaint seeking an injunction or declaratory judgment, and a complaint seeking monetary damages for past wrongs under 42 U.S.C. §§ 1983, 1985.

A complaint seeking injunctive or declaratory judgment relief seeks relief which is prospective in nature. The complaint under 42 U.S.C. §§ 1983, 1985 seeks redress of past wrongs by way of money damages, and is retrospective in nature. The "subject" of an action seeking equitable relief is in almost all cases a tax statute or ordinance. The "subject" of the civil rights action is the state actor's conduct and state of mind. It is therefore erroneous to assert that "[t]he allegations and subject of the complaint remain the same." Petition at 13.

An injunction against a state taxing procedure necessarily disrupts that procedure. Declaratory judgment actions seeking the adjudication of the

constitutionality of state tax laws and procedures are also disruptive of the state taxing procedure as they may act to suspend collection of the taxes under the challenged statute. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. at 299, 87 L. Ed. at 1411-12; *Ludwin* v. *City of Cambridge*, 592 F.2d at 608-609.

Respondent's complaint does not seek to enjoin the assessment, levy, or collection of any tax. The action does not seek a refund of any tax paid. The complaint does not even allege that the assessment was erroneous — that issue was decided by the Michigan Tax Tribunal in favor of Respondent. The favorable decision in the Michigan Tax Tribunal may "lay the groundwork for a claim of intentional misconduct by the officials." *Ludwin* v. *City of Cambridge*, 592 F.2d at 610.

Respondent has at all times strictly adhered to the requirements of Michigan law, paying on a timely basis all disputed taxes, and initiating refund proceedings before the Michigan Tax Tribunal. No declaratory or other equitable relief is sought by the Respondent. No state tax law, substantive or procedural, is being challenged. There is no federal constitutional issue which will turn on a question of state tax law. This action is simply not a "tax" case. This is a civil rights action in response to intentional discrimination under color of state law and pursuant to official policy. The only issue in this action is one of fact: whether Petitioners violated Respondent's constitutional rights intentionally, or with reckless disregard of those rights. The fact that Petitioners deprived Respondent of its civil rights through the power of the tool of taxation is irrelevant to Respondent's claim for damages.

Despite the fact that a civil rights action against a tax assessor is not precluded by the Tax Injunction Act, nor

by those principles which have led the federal courts to decline jurisdiction of cases seeking refunds, declaratory judgments, and other anticipatory and prospective relief, Petitioners suggest that this action should be dismissed because "of the potential chilling effects which result from these suits on the state's administration of its taxes." Petition at 16.

Petitioners have not alleged or demonstrated that state tax officials are more sensitive to potential federal civil rights actions than other officials acting under color of state law. State tax officials, like other persons acting under color of state law, have relief in knowing that a good faith defense may be asserted against a federal civil rights action. *Wood* v. *Strickland*, 420 U.S. 308, 43 L. Ed. 2d 214 (1975). Potential liability under 42 U.S.C. §§ 1983, 1985 does not appear to have immobilized with fear other state actors, be they policemen or governors.

The logical extension of Petitioners' claim is that the maintenance of this action in federal court has a greater chilling effect upon state tax officials than the maintenance of the action in state court. This cannot and should not be so. The state court must apply federal law in the same manner as the district court. This Court has consistently held that individuals seeking relief under 42 U.S.C. §§ 1983, 1985 need not present their claims in state court prior to presenting their claims in federal court. *Zablocki* v. *Redhail*, 434 U.S. 374, 54 L. Ed. 2d 618 (1978); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 19 L. Ed. 2d 444 (1967).

Concern for the possible chilling effect this action may have upon state taxing officials must be balanced against the concern for the citizen's right to a federal forum to hear its uniquely federal cause of action. To decline

to exercise the federal jurisdiction given by the Constitution and Congress whenever a possible conflict could arise between the federal government and the states would ignore our federal form of government. The legislative history of 42 U.S.C. §§ 1983, 1985 makes it clear that Congress recognized that

> it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
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> * * *
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> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'

Mitchum v. *Foster*, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 717 (1972) (citation omitted).

CONCLUSION

The relief requested in Respondent's complaint is not prohibited by the text of the Tax Injunction Act. Nor is the relief requested violative of those principles which underlie the Act. If Congress had desired to preclude all actions against state tax officials in federal courts, it could have done so. There is no conflict between the circuit courts of appeal on the issue of whether a

damages action under 42 U.S.C. §§ 1983, 1985 is precluded by either the text of the Tax Injunction Act, or its underlying principles. The three circuit courts of appeal to address the issue, the 1st, 6th and 7th Circuits, are in harmony and clearly hold that a civil rights action for damages is not precluded. The only circuit court of appeals case relied upon by Petitioners to establish a conflict between the circuit courts of appeal expressly refused to decide the issue decided by the 1st, 6th and 7th Circuit Courts of Appeal. *A Bonding Co.* v. *Sunnuck*, 629 F.2d 1127, 1132-33; 1133 n. 6 (5th Cir. 1980).

For these reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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